Honan Plantations Sdn Bhd v Kerajaan Negeri Johor & Anor and another appeal

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO J-01-30-1996 AND J-02-68-96
GOPAL SRI RAM, SITI NORMA YAAKOB AND DENIS ONG JJCA
14 JANUARY 1998

Civil Procedure *— Pleadings — Striking out statement of claim — Ground: disclosing no reasonable cause of action — Allegation that land acquisition by state authority was ultra vires — Whether statement of claim disclosed any reasonable cause of action — Rules of the High Court 1980 O 18 r 19(1)(a)*

The appellant was the registered proprietor of certain land ('the land'). It filed proceedings in the High Court challenging the decision by the first respondent to acquire the land under the Land Acquisition Act 1960. In its statement of claim, the appellant claimed that the land was acquired contrary to law in the sense that the acquisition was ultra vires or vitiated on 'Anisminic' grounds or for 'Wednesbury unreasonableness'. The respondents applied to strike out the action on the ground that it disclosed no reasonable cause of action based on O 18 r 19(1)(a) of the Rules of the High Court 1980 ('the RHC'). The High Court judge struck out the appellant's statement of claim and held, inter alia, that land once acquired can never be recovered from the acquiring authority and that the act of acquiring can never be challenged (see [1998] 5 MLJ 129). The appellant appealed.

Held, allowing the appeal:

(1) The principles governing an application made under O 18 r 19(1)(a) of the RHC are well settled. It is only appropriate in cases which are plain and obvious so that a judge can say at once that a statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff to the relief of which he asks for. In essence, the principle is that pleadings ought not to be struck out save in plain and obvious cases. Based on authorities, it could not be said that the statement of claim in the instant case disclosed no reasonable cause of action whatsoever. The facts pleaded in the statement of claim abundantly disclosed a reasonable cause of action. The judge had misdirected himself in holding that the statement of claim was demurrable and ought to be struck out (see pp 501E–F, 502B, 504G and 505D).

(2) The court disagreed with the argument of the respondents that the passage in *Syed Omar bin Abdul Rahman Taha Alsagoff & Anor v The Government of the State of Johor* [1979] 1 MLJ 49 — that the action of the state government in that case was entirely proper — established any principle of general application. The passage relied on by the respondents was merely a holding on the facts of that case and not a principle of law (see p 505C–D).

[Bahasa Malaysia summary

Perayu adalah tuan punya berdaftar tanah tertentu ('tanah tersebut'). Ia memfailkan prosiding di Mahkamah Tinggi mencabar keputusan oleh penentang pertama untuk mengambil tanah tersebut di bawah Akta Pengambilan Tanah 1960. Dalam pernyataan tuntutannya, perayu menuntut bahawa tanah tersebut telah diambil bertentangan dengan undang-undang dalam ertikata bahawa pengambilan adalah ultra vires atau dijadikan tidak sah atas alasan 'Anisminic' atau untuk 'ketidakmunasabahan Wednesbury'. Penentang-penentang memohon untuk membatalkan tindakan atas alasan bahawa ia tidak mendedahkan sebarang kausa tindakan yang munasabah berdasarkan A 18 k 19(1)(a) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Hakim Mahkamah Tinggi membatalkan pernyataan tuntutan perayu dan memutuskan, antara lain, bahawa tanah yang telah diambil tidak boleh didapat balik daripada pihak berkuasa yang mengambil dan bahawa tindakan mengambil tidak boleh sesekali dicabar (lihat [1998] 5 MLJ 129). Perayu membuat rayuan.

Diputuskan, membenarkan rayuan:

(1) Prinsip-prinsip yang menguasai permohonan yang dibuat di bawah A 18 k 19(1)(a) KMT adalah mantap. Ia hanyalah wajar dalam kes-kes yang nyata supaya hakim boleh mengatakan dengan segera bahawa suatu pernyataan tuntutan sebagaimana ia didapati tidak memadai, sekalipun dibuktikan, untuk memberi hak kepada plaintif mendapatkan relief yang dimintanya. Pada dasarnya, prinsip adalah bahawa pliding tidak patut dibatalkan kecuali dalam kes yang jelas dan nyata. Berdasarkan autoriti, ia tidak boleh dikatakan bahawa pernyataan tuntutan dalam kes ini tidak mendedahkan apa-apa kausa tindakan yang munasabah sama sekali. Fakta-fakta yang diplidkan dalam pernyataan tuntutan dengan jelasnya memperlihatkan kausa tindakan yang munasabah. Hakim telah menyalah arah dirinya dalam memutuskan bahawa pernyataan tuntutan adalah 'demurrable' dan patut dibatalkan (lihat ms 501E–F, 502B, 504G dan 505D).

(2) Mahkamah tidak bersetuju dengan hujah penentang-penentang bahawa petikan-petikan dalam *Syed Omar bin Abdul Rahman Taha Alsagoff & Anor v The Government of the State of Johor* [1979] 1 MLJ 49 — bahawa tindakan kerajaan negeri dalam kes itu adalah wajar pada keseluruhannya — menunjukkan mana-mana prinsip kegunaan umum. Petikan yang diharapkan oleh penentang-penentang cumalah keputusan atas fakta-fakta kes itu dan bukanlah prinsip undang-undang (lihat ms 505C–D).]

Notes

For cases on the striking out of a statement of claim, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2711–2747.

Cases referred to

Anisminic Ltd v Foreign Compensation Commission & Anor [1969] 2 AC 147 (refd)

Associated Provincial Picture Houses Ltd v Wednesbury Corp [1948] 1 KB 223 (refd)

Mooney & Ors v Peat Marwick Mitchell & Co & Anor [1967] 1 MLJ 87 (refd)

Pemungut Hasil Tanah, Daerah Barat Daya, Pulau Pinang v Ong Gaik Kee [1983] 2 MLJ 35 (refd)

S Kulasingam & Anor v Commissioner of Lands, Federal Territory & Ors [1982] 1 MLJ 204 (refd)

Syed Omar bin Abdul Rahman Taha Alsagoff & Anor v The Government of the State of Johor [1979] 1 MLJ 49 (refd)

Yeap Seok Pen v Government of the State of Kelantan [1986] 1 MLJ 449 (refd)

Legislation referred to

Land Acquisition Act 1960 s 8(3)
Rules of the High Court 1980 O 18 r 19(1)(a)

Appeal from: Civil Suit No 21–179–1995 (High Court, Johor Bahru)

Tommy Thomas (*Lim Chee Wee* with him) (*Skrine & Co*) for the appellant in both appeals.

Zainal Adzam bin Abd Ghani (Johor State Legal Adviser) (*Teo Say Eng*, Senior Federal Counsel with him) for the respondents in the first appeal.

Zaki bin Tun Azmi (*Rashid & Lee*) for the respondent in the second appeal.

Gopal Sri Ram JCA (delivering oral judgment): The appellant before us (plaintiff in the court below) was the registered proprietor of approximately 996 hectares of land situated in the State of Johor. It filed proceedings in the High Court of Johor challenging the decision by the first defendant (the State Government of Johor) to acquire the land, which I will, for convenience, refer to as 'the subject property'. This forms the subject matter of Civil Appeal No J–01–30–96 ('the first appeal'). There is another appeal before us arising out of the same subject matter. It is Civil Appeal No J–02–68–96 ('the second appeal'). I will say something more of the second appeal in a moment.

Returning to the facts of the case, the plaintiff in its statement of claim, apart from joining the Government of Johor and the Land Administrator, cited Prolink Sdn Bhd as the third defendant. The gist of the appellant's complaint is that the subject property was acquired contrary to law in the sense that the acquisition was ultra vires or vitiated on 'Anisminic' grounds (the reference here being to the decision of the House of Lords in *Anisminic Ltd v Foreign Compensation Commission & Anor* [1969] 2 AC 147) or for 'Wednesbury unreasonableness' (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223). After

A service of the writ and statement of claim on all defendants, applications were taken out by the first and second respondents in the first appeal as well as Prolink (respondent in the second appeal) to strike out the action on the ground that it disclosed no reasonable cause of action.

The learned judge who heard both sets of applications granted them B and struck out the plaintiff's statement of claim (see [1998] 5 MLJ 129). The appellant has now filed two appeals and as I have said, in the first appeal, it is the Johor Government and Land Administrator who are the respondents.

I now turn to the second appeal merely to state that the respondent is C Prolink and that the challenge by the appellant is limited to the order made in the separate summons in that case.

For convenience, we heard both the appeals together and I propose to give reasons for my decision in both appeals at the same time.

The application to strike out in the first appeal was based on O 18 D r 19(1)(a) of the Rules of the High Court 1980. In the second appeal, affidavits were also filed but as events transpired they were not used. Counsel before us have therefore proceeded on the ground that both appeals are grounded and are to be treated as having been made under O 18 r 19(1)(a).

The principles governing an application made under O 18 r 19(1)(a) E are well settled and have been stated by our courts on many occasions. For my part I can do no better than to quote from the judgment of Raja Azlan Shah J (as he then was) in *Mooney & Ors v Peat Marwick Mitchell & Co & Anor* [1967] 1 MLJ 87 at p 88:

> It is firmly established that the power exercised under r 4 [the precursor to F O 18 r 19] 'is only appropriate in cases which are plain and obvious so that a judge can say at once that a statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff to the relief of which he asks for': see the judgment of Lindley MR in *Hubbuck & Sons v Wilkinsons Heywood & Clark Ltd* [1899] 1 QB 86 at p 91. Where the situation arises, the pleadings and particulars alone shall be considered and all the allegations in it shall be G presumed to be true, and it is only on that assumption that any suitable case can be made for this application: see *Peck v Russell* (1923) 4 FMSLR 32 at p 34. The court cannot and indeed is not empowered to look behind the pleadings and particulars if it discloses a reasonable cause of action. So long as the statement of claim discloses some ground of action, the mere fact that the plaintiff is not likely to succeed on it at the trial is no ground for it to be H struck out: see *Boaler v Holder* (1886) 54 LT 298. A recent exposition of the law is afforded by the judgment of Danckwerts LJ in *Wenlock v Moloney* [1965] 1 WLR 1238 at p 1243:
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> > 'Under the rule (ie 25 r 4) it had to appear on the facts of the plaintiff's pleadings that the action could not succeed or was objectionable for some other reason. No evidence could be filed .... But, as the procedure I was of a summary nature the party was not to be deprived of his rights to have his case tried by a proper trial unless the matter was clear.'
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> After stating that the former rules are now incorporated in the revised Rules of the Supreme Court, O 18 r 19, he continues:

> 'But this summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case in order to see whether the plaintiff really has a cause of action. To do that is to usurp the position of the trial judge.'

In essence, therefore, the principle is that pleadings ought not to be struck out save in plain and obvious cases.

The learned judge in the present case stated the principles applicable to an O 18 r 19 application with accuracy. The only complaint before us by the appellant is that he misapplied those principles to the facts of the instant appeal.

At the heart of the matter lies the question whether an acquisition under the Land Acquisition Act 1960 ('the Act') is capable of challenge and if so, on what grounds. That question has already received judicial treatment in cases decided by the highest courts of this country. Before discussing the line of authority cited to us by En Tommy Thomas of counsel for the appellant, I think I should sum up the effect of those cases. It is this. An acquisition made under the provision of the Act cannot be challenged unless a plaintiff establishes that the acquiring authority had misconstrued its powers or had acted in bad faith or with gross unreasonableness. The limit of the challenge is occasioned by the wording of s 8(3) of the Act, which reads:

> A declaration in Form D shall be conclusive evidence that all scheduled land referred to therein is needed for the purpose specified therein.

In *Syed Omar bin Abdul Rahman Taha Alsagoff & Anor v The Government of the State of Johor* [1979] 1 MLJ 49 (PC), the Privy Council, whose advice on that occasion was delivered by Viscount Dilhorne, put the matter in this way (at p 50):

> Section 8(3), as has been said, provides that the declaration shall be conclusive evidence that all scheduled land is needed for the purpose specified therein. While it may be possible to treat a declaration made pursuant to this subsection as a nullity if it be shown that the acquiring authority has misconstrued its statutory powers (see *Anisminic v Foreign Compensation Commission & Anor* [1969] 2 AC 147) or that the purpose stated in the declaration does not come within s 3, in the absence of bad faith, which in the instant case is negatived by concurrent findings of facts in the court below, this subsection renders it not possible to challenge its validity by asserting that some of the land to which it relates is not needed for the purposes stated or that the land is in fact wanted for purposes other than those specified. Consequently the fact that the lands listed in the Schedule amounted to some 5,700 acres when the total area of the State Development Officer's original requirements was 2,000 acres does not help the appellants, nor can it really be contended that the purposes stated in the declaration do not come within s 3.

The next authority is *S Kulasingam & Anor v Commissioner of Lands, Federal Territory & Ors* [1982] 1 MLJ 204. There, Hashim Yeop A Sani J (as he then was) when dismissing the challenge to acquisition, explained the effect of the *Alsagoff* case as follows (at p 208):

A The challenge of the plaintiff on this point, however, can be fully answered by the judgment of the Privy Council in *Syed Omar bin Abdul Rahman Taha Alsagoff & Anor v The Government of the State of Johor* [1979] 1 MLJ 49 where the Privy Council in dismissing the appeal held that s 8(3) of the Land Acquisition Act 1960 provides that the declaration issued under the section shall be conclusive evidence that all the scheduled land is needed for B the purpose specified therein. The judgment of Viscount Dilhorne would seem to reaffirm *Wijeyesekera v Festing* AIR 1919 PC 155 and *SMT Somavanti & Ors v State of Punjab & Ors* [1963] 2 SCR 774, on the matter of the government declaration of public purpose but the judgment also goes one step further in providing for the circumstances when the courts can treat such declaration as a nullity.

C Abdoolcader J (as he then was) in delivering the judgment of the Federal Court in the same case said of the effect of s 8(3) (at p 211):

> The conclusive evidence clause in s 8(3) which we have mentioned in effect provides that the decision of the state authority that the land is needed for the purpose specified under s 8(1) is final and conclusive and cannot be D questioned (*Wijeyesekera v Festing* AIR 1919 PC 155). The Privy Council however held in *Syed Omar bin Abdul Rahman Taha Alsagoff & Anor v The Government of the State of Johor* [1979] 1 MLJ 49 (at p 50) that it may be possible to treat a declaration under s 8 as a nullity if it be shown that the acquiring authority has misconstrued its statutory powers or that that purpose stated therein does not come within s 3 or if bad faith can be established. E The purpose of the acquisition can therefore be questioned but only to this extent.

In *Pemungut Hasil Tanah, Daerah Barat Daya, Pulau Pinang v Ong Gaik Kee* [1983] 2 MLJ 35, Salleh Abas CJ (Malaya) (as he then was) said in the context of land acquisition cases (at p 37):

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> Every exercise of statutory power must not only be in conformity with the express words of the statute but above all must also comply with certain implied legal requirements. The court has always viewed its exercise as an abuse and therefore treats it as illegal where the exercise is done for an inadmissible purpose or on irrelevant grounds or without regard to relevant considerations or with gross unreasonableness (*de Smith's* (4th Ed) at p 323; G and *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223).

Finally in *Yeap Seok Pen v Government of the State of Kelantan* [1986] 1 MLJ 449, Lord Griffith in two passages, in the advice of the Privy Council, set out the principles applicable to a challenge of land acquisition H in the face of s 8(3) of the Act. This is how he put it at p 451:

> In presenting her appeal to this Board, the appellant has confined herself to the second of her original grounds, namely, that the compulsory acquisition of her land was made in bad faith in that her land was selected for compulsory acquisition because she is not of Malay origin, and that the government I used their compulsory purchase powers as a device to prevent her, as a Chinese Malaysian, from becoming the owner of land. If the appellant could prove that this was the disgraceful purpose for which the compulsory purchase power was used, it would be a clear case of abuse of power entitling her to have the compulsory purchase order quashed. There is no

dispute about this principle of law and it was recognized by both the judge and the Federal Court. But as the trial judge rightly observed, bad faith of this order is an exceedingly serious allegation to make and she, who makes it, has a heavy burden to discharge the onus of proving it.

And at p 453 he said:

... He who asserts bad faith has the burden of proving it, mere suspicion is not enough. In deciding whether the burden is discharged, the court will consider all the evidence before it, including any explanation given by the Minister and any inference to be drawn from the failure to give an explanation. Their Lordships can see no reason to suppose that this was not the approach adopted in the Federal Court.

Secondly, there is no reason to suppose that the courts below did consider that the material placed before them by the appellant raised the suspicion of bad faith. They rehearsed the appellant's argument in the judgments but did not say that they were suspicious of the respondent's motives.

Thirdly, unlike the case of *Soblen* [*R v Governor of Brixton Prison, ex p Soblen* [1963] 2 QB 243] in which discovery had been refused, no attempt was made by the appellant, either through a request for discovery or to cross-examine upon the respondent's affidavits, to probe into the Foundation's reasons for requesting the compulsory acquisition of her property.

This was an allegation of bad faith founded on scanty evidence. Their Lordships are not surprised that that evidence was held to be insufficient to discharge the burden of proof upon the appellant and can find no fault in the judgment of the Federal Court.

As I have already said, the statement of claim in the present case includes a challenge which falls plumb within the grounds of challenge formulated in the cases I have discussed a moment ago. Can it be then said that the statement of claim in the instant case discloses no reasonable cause of action whatsoever? After anxious consideration I am inclined to answer in the negative. In my judgment, the facts pleaded in the statement of claim abundantly disclose a reasonable cause of action. In coming to this conclusion I have not overlooked the powerful submissions of Dato' Zainal, State Legal Adviser and Dato' Zaki of counsel for Prolink, that the Privy Council had in the *Alsagoff* case treated as entirely proper the action of the state government in that case as reflected in the following passage in the judgment of Viscount Dilhorne at p 50 of the report:

Paragraph 1 of that declaration is, as Syed Othman J held, 'the material or substantive part of the declaration', a conclusion with which the Federal Court agreed and with which their Lordship agree. The schedule attached to the declaration lists the lands to be acquired and the paragraph states the purposes of the acquisition. The plan referred to in para 2 has to be a plan of the lands and areas so specified. *The Act imposes no obligation on the acquiring authority to produce a plan for inspection which shows how the land to be acquired is to be zoned. Such evidence as there was to the effect that zoning of the area which effected the appellants' lands for special purposes in this draft lay-out plan prepared by the Planning Officer was never accepted and approved by the state authority; but even if it had been, that would not, in their Lordships' view,*

fell outside s 3 of para 1 of the declaration for where, as in the instant case, a new town is to be created, the provision of space for creation may be regarded as an incidental to zoning for residential use. The Interpretation and General Clauses Ordinance 1948, s 30, provides that:

> 'Where a written law confers on any person to do ... any act or thing, all such powers shall be understood to be also conferred as are reasonably necessary to enable the person to do ... the act or thing.'

In the event, however, the appellants' lands have actually been used as part of a shipyard. (Emphasis added.)

With respect, I am unable to agree with the arguments of the learned State Legal Adviser and Dato' Zaki that the above passages establish any principle of general application. In my judgment, the answer to the submissions made by counsel for both the respondents was provided during argument this morning by my learned brother Denis Ong JCA who described the passage relied upon as merely a holding on the facts of that case and not a principle of law. I am of like mind.

Having considered the matter carefully, I am compelled to arrive at the conclusion that the learned judge had misdirected himself in holding that the statement of claim was demurrable and ought to be struck out. It would appear from his judgment that his view is that land once acquired can never be recovered from the acquiring authority and that the act of acquiring can never be challenged. This comes across in the following passage in his judgment ([1998] 5 MLJ 129 at p 154):

> But in the face of statutory prohibitions expressly or necessarily implied in the Act as discussed above, and after having cautioned myself, I am of the view that the plaintiff's action against the first and second defendant is 'obviously unsustainable'. The pleading do not at all disclose some cause of action or even raise any question fit to be decided. Furthermore, s 8(1) of the Specific Relief Act 1950 provides that if any person is dispossessed without his consent of immovable property *otherwise that in due course of law* he may, by suit, recover possession thereof and s 8(3) provides that no suit under this section shall be brought against any government in Malaysia. The plaintiff has, by virtue of the acquisition by the state authority, been dispossessed of its land *in due course of law* and even if assuming that he proves that there was malice, I cannot see how he can bring a suit against the State Government of Johor in the face of such a provision. (Emphasis added.)

I have consciously refrained from regurgitating the statement of claim and the particulars pleaded under its several paragraphs. I have not undertaken that task because the learned judge in his judgment has sufficiently set out the allegations in the statement of claim and admirably summarized them.

For the reasons I have given, I am of the view that this appeal should be allowed. The orders I propose to make are as follows:

(1) Civil Appeals Nos J–01–30–96 and J–02–6 –96 are hereby allowed;

(2) The order of the judge dated 19 January 1996 is set aside;

(3) The writ and statement of claim shall be restored to file;

(4) The defendants in this appeal are to file their defences within six weeks from the date of this order; and

(5) There shall be no order as to costs against the respondents in the first appeal, both here and in the court below. The respondent in the second appeal shall pay all the costs of the appeal and in the court below. These costs shall be taxed but there shall be a stay upon the allocatur until further order.

Siti Norma Yaakob JCA: I concur.

Denis Ong JCA: I concur.

Appeal allowed.

Reported by Jafisah Jaafar